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No. 95-273

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

KEYSTONE SANITATION COMPANY, INC., ET AL.,
Petitioners,

v.

ARCATA GRAPHICS FAIRFIELD, INC., ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE NATIONAL BAR ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONERS

The National Bar Association ("NBA"), pursuant to Rule 37.2 of the rules of this Court, respectfully moves for leave to file a brief amicus curiae in support of the petitioners. Counsel for the petitioners has consented to the filing of this brief. Counsel for the National Bar Association has not received responses from all respondents to its request for consent, and is accordingly filing this motion seeking leave to file the attached brief.

The NBA, founded in 1925, is an organization comprised of over 20,000 lawyers, most of whom are

African-American, located across the United States and the world. The NBA's mission is to promote social justice for improvement of the educational, social and economic welfare of African-Americans and other socially and economically disadvantaged Americans. Although the issue presented in the petition for writ of certiorari may appear at first blush to be far removed from the ordinary concerns of the NBA, the NBA seeks leave to file its brief amicus curiae to provide the Court with an additional perspective on that question. From the NBA's perspective, the question presented in the petition implicates significant civil rights and social justice concerns because, under the decision below, legal doctrines frequently used to protect the disadvantaged in our society are subjected to lenient waiver standards and the protection afforded by those doctrines is thereby substantially undermined.

Accordingly, the NBA requests leave of the Court to file the attached brief amicus curiae in support of the petition.

Respectfully submitted,

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QUESTION PRESENTED

Whether the disclosure of documents subject to the attorney-client privilege waives the privilege with respect to those documents, as well as other undisclosed privileged documents on the same subject, where the disclosed documents were produced inadvertently by counsel and without the knowledge or consent of the client.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

CONCLUSION 8

TABLE OF AUTHORITIES

Page

CASES:

Berg Electronics, Inc. v. *Molex, Inc.*, 875 F. Supp. 261 (D. Del. 1995) 6

CFTC v. *Weintraub*, 471 U.S. 343 (1985) 3,6

Fisher v. *United States*, 425 U.S. 391 (1976) 3

Hatton v. *Robinson*, 31 Mass. (14 Pick.) 416 (1833) 4

Hunt v. *Blackburn*, 128 U.S. 464 (1888) 3,6

Johnson v. *Zerbst*, 304 U.S. 458 (1938) 7

Trammel v. *United States*, 445 U.S. 40, 51 (1980) 3

United States v. *Schwimmer*, 892 F.2d 237 (2d Cir. 1989) 6

United States v. *Zolin*, 491 U.S. 554 (1989) 3,4

Upjohn Co. v. *United States*, 449 U.S. 383 (1981) 3,4

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BRIEF AMICUS CURIAE OF THE NATIONAL BAR ASSOCIATION IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST

As explained in the foregoing motion for leave to file brief amicus curiae, the National Bar Association ("NBA"), founded in 1925, is an organization comprised of over 20,000 lawyers, most of whom are African-American, located across the United States and the world. The NBA's mission is to promote social justice for improvement of the educational, social and economic welfare of African-Americans and other socially and economically disadvantaged Americans. In the view of the NBA, the protections afforded by the attorney-client

privilege and the work product doctrine are invaluable to the exercise of legal rights by the victim and the disadvantaged in our society. Under the decision below, however, even an inadvertent production of privileged documents by counsel removes the protection afforded by the privileges. If widely accepted, such a holding would considerably reduce the willingness of many in our society to seek counsel to protect their legal and civil rights, and would consequently result in a lessening of the protection afforded by those rights. Accordingly, the NBA urges this Court to grant the petition and reverse the decision below.

SUMMARY OF ARGUMENT

As the petition itself explains, the lower federal courts are in disarray over the appropriate consequences of the inadvertent production of privileged documents, adopting three different approaches on the issue of waiver *vel non* and two different approaches on the scope of any waiver. *See* Petition at 7-13. That disarray and the costs it imposes are reason enough for the Court to consider the question presented in this case.

In addition, the NBA believes that the decision below provides inadequate protection for the fundamental civil right to seek the confidential advice of legal counsel. Although that right is obviously most important in criminal matters, where physical liberty is at stake, courts have long recognized the constitutional overtones that attend a litigant's selection of and consultation with counsel in civil matters. The value of the right to counsel is seriously diminished in a regime in which counsel consulted on a confidential basis may be deemed to have waived the privilege for the client

through mere inadvertence on the part of the counsel. In addition, the decision below further devaluates the right because any waiver is not narrowly circumscribed but rather extends broadly to communications on the same subject matter.

This Court should grant the petition and reverse the decision below to protect the privilege for communications with attorneys from all but voluntary and knowing waivers, and to emphasize that any waiver is to be narrowly construed.

ARGUMENT

This Court has long "recognized the attorney-client privilege under federal law, as 'the oldest of the privileges for confidential communications known to the common law.'" *United States* v. *Zolin*, 491 U.S. 554, 562 (1989) (quoting *Upjohn Co.* v. *United States*, 449 U.S. 383, 389 (1981)). The "central concern" of the privilege is "'to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.'" *Zolin*, 491 U.S. at 562 (quoting *Upjohn*, 449 U.S. at 389)). *See also CFTC* v. *Weintraub*, 471 U.S. 343, 348 (1985). In order to vindicate that concern, those seeking legal counsel must be free to "make full disclosure to their attorneys," *Fisher* v. *United States*, 425 U.S. 391, 403 (1976), so that they may receive the fully informed "aid of persons having knowledge of the law and skilled in its practice." *Hunt* v. *Blackburn*, 128 U.S. 464, 470 (1888). *See also Trammel* v. *United States*, 445 U.S. 40, 51 (1980) (privilege "rests on the need for the advocate and counselor to know all that relates to the client's reasons

for seeking representation if the professional mission is to be carried out").

In explaining the importance of the attorney-client privilege, the force of what Justice Shaw said over 160 years ago is undiminished today:

> The principle we take to be this; that so numerous and complex are the laws by which the rights and duties of citizens are governed, so important is it that they should be permitted to avail themselves of the superior skill and learning of [attorneys] both in ascertaining their rights in the country, and maintaining them most safely in court * * * that the law has considered it the wisest policy to encourage and sanction this confidence, by requiring that on such facts the mouth of the attorney should be forever sealed. [*Hatton* v. *Robinson*, 31 Mass. (14 Pick.) 416, 422 (1833)].

In our society, those most in need of legal advice are frequently found in vulnerable positions--for example, facing criminal charges by state authorities or suffering discrimination at the hands of those who employ them. Because of their vulnerability, however, these individuals are reluctant to seek legal advice unless they can be assured that communications with counsel will remain confidential. Indeed, the guarantee that their consultations with attorneys will remain confidential is generally a prerequisite to the "full and frank communication between attorneys and their clients," *Zolin*, 491 U.S. at 562 (quoting *Upjohn*, 449 U.S. at 389), that the privilege is intended to foster. In the absence of a guarantee that their confidence will not be violated, those most in need of legal advice may well neither disclose their confidences nor receive the

informed advice of counsel. In that case, the "broader public interests in the observance of law and administration of justice" served by the privilege are substantially injured. *Id.*

Fortunately, attorneys can generally assure clients that communications with counsel for the purpose of seeking legal advice are closely guarded in our society. Rules of evidence, ethical requirements, and a variety of other protections permit the attorney to state with confidence that the client may speak freely without fear of disclosure and reprisal.

Under the rule adopted by the Third Circuit and other courts holding that an attorney's inadvertence might waive the client's privilege, however, an attorney seeking to reassure a client that the client may speak freely must join to that reassurance a caution that otherwise privileged communications can lose their protection if the attorney discloses them even through mere inadvertence. The attorney must also warn the client that not only the disclosed communications but also any communications on the same subject matter would then be subject to discovery by, for example, the client's employer in the context of a discrimination action. Far from providing the assurance likely to lead to full and frank discussion and advice, the attorney would be placed in the position of warning the client of the risks of unwitting disclosure. Transformation of the privilege from a strong protection that may be knowingly and intelligently waived by the client to one that crumbles in the face of an attorney's mistake will undoubtedly reduce the frankness of communications, the quality of legal advice, and ultimately the level of

justice afforded to those most in need of legal advice -- such as those seeking to protect their civil rights.

The rule urged the petitioners in this case, by contrast, "best serves the interests of the attorney-client privilege, as it protects the client from the apprehension that consultations with their legal advisors will be inadvertently disclosed and applies the privilege in a way that is predictable and certain." *Berg Electronics, Inc.* v. *Molex, Inc.*, 875 F. Supp. 261, 263 (D. Del. 1995). Once the apprehension of disclosure is removed by application of a predictable and certain rule governing waivers, those seeking legal advice will be significantly more likely to make full disclosure to counsel and, consequently, to receive the benefit of informed legal counsel.

Refusing to find a waiver based on an attorney's inadvertence also best comports with the longstanding recognition that "the privilege is that of the client alone," *Hunt* v. *Blackburn*, 128 U.S. at 470, and that the *client* must be the one to waive the privilege if a waiver is to be made. *Weintraub*, 471 U.S. at 348. Under the rule petitioners propose, the client will remain in control of disclosures, rather than being subject to unauthorized disclosures because of counsel's mistakes.

Finally, the Court should grant the petition to reaffirm the high standard of proof that is generally required to find a waiver of rights or privileges. As the petitioners note, Petition at 14-15 & nn.9, 10, this Court has recognized that civil litigants have a constitutional right to retain counsel by virtue of the Fifth and Fourteenth Amendments. Without the attorney-client privilege, that right "would in large part be rendered meaningless." *United States* v. *Schwimmer*, 892 F.2d

237, 243 (2d Cir. 1989). Given the importance of the right and the privilege, it is appropriate to find waivers only under the same circumstances in which constitutional rights generally are found to be waived, *i.e.*, when there has been "the *intentional* relinquishment or abandonment of a known right or privilege." *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938) (emphasis added). This well-established standard serves as a significant bulwark in a variety of circumstances against hasty findings that constitutional rights have been waived. If some rights or privileges may be waived through simple inadvertence of an agent, without any action by the person holding the right or privilege, that bulwark will be considerably eroded. In the view of the NBA, this Court should not permit that erosion to occur, but should instead jealously guard the high standard of proof that is applied to waiver questions. Only that standard provides adequate protection for fundamental constitutional and civil rights. This Court should grant the petition to reaffirm that those rights--including the right to counsel and the privilege that makes that right meaningful--may not be sacrificed through anything but intentional action.

CONCLUSION

For the foregoing reasons, and those stated in the Petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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